United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

31-1

626

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,907

ERNEST S. MITZNER

v.

WILLIAM C. BAYLIES, *et al.*,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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Washington, D. C. THIEL PRESS 202 [illegible]

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CASES:

Printers error in App number references
(1) All App numbers prior to 15 are correct
(2) All App numbers after App 15 can be corrected by adding 10 pages to each app number given
Ex. Thus App 99 is corrected to App 109 etc
App 50 becomes correctly App 60 etc

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*Cases principally relied on.

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STATEMENT OF ISSUES PRESENTED*

1. Did the lower court err by not allowing the appellants to introduce into the evidence the Regulations of the District of Columbia Commissioners which defines "engaged in the business of loaning money"?

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*This case has not previously been before this Court.

2. Did the Court err in not instructing the jury that if they find the two notes to be usurious, then the deed of trust is illegal and void since the appellee did not have a license to lend money as required by Title 26:601 of the D.C. Code?

3. Did the Court err in not giving the appellant a new trial as the verdict is contrary to the evidence and the verdict is not supported by the weight of the evidence?

STATEMENT OF THE CASE

The appellee filed a complaint for a deficiency judgment for $14,741.40 against the appellants after the appellee foreclosed on a second deed of trust the appellants signed April 19, 1966 for "money loaned" bearing a face amount of $12,500.00 at 6% interest with the balance due six months later. For this the appellants received $11,000.00 less costs. (App. ~~279~~ 284, 285) This note under the deed of trust was made payable to one Constance E. Ferguson, who then endorsed the note without consideration to appellee, Mitzner. Said Constance E. Ferguson was the secretary for the attorney of the appellee and only a straw party since no money was paid to her, nor did she lend or advance any money to appellants. (App. ~~91, 92, 93~~ 61, 62, 63) It was stipulated in the Pretrial Statement that "*no consideration was paid to said payee (Ferguson) on account of said notes*". This blanket second deed of trust covered three pieces of property of the appellants. (App. ~~281~~ 291). Two of the said properties were bid in at foreclosure by appellee, Mitzner, but he never made settlement. (App. ~~38~~ 43) One of these properties, 1317 Riggs Street, N.W., was titled in appellants' names at time of trial, and the second trust was still recorded against this property as a lien.

Six months later when the said note under this deed of trust became due on October 19, 1966, the appellants were unable to refinance their property to pay off the appellee, so a second trans-

action was entered into between appellants and appellee. The appellants paid $2,900.00 for an extension to the appellee and his attorney as follows: $2,500.00 for the extension, $375.00 for interest, plus $25.00 attorney's fee to appellee's attorney, Jacob Sheeskin. (App. ~~256, 257, 258~~) 266, 267, 268

On September 12, 1967, a third transaction was entered into between appellants and appellee. This transaction was an irrevocable letter of assignment given by the appellants to the appellee for a postponement of foreclosure until September 27, 1967. The amount of the assignment was $16,151.60 and was to be paid from proceeds of pending refinancing on another property. (App. ~~261, 289~~) 271, 299

A fourth transaction was entered into on September 26, 1967 (App. ~~765~~) when pending financing had not proved forthcoming, but new financing by a standby committment was offered by a life insurance company through a broker. Appellants signed an irrevocable letter of assignment to appellee and a note for $2,750.00 at 6% interest due in 30 days. (App. 290, 291) Appellee then advanced to his attorney, Jacob Sheeskin, $1,750 and Sheeskin advanced to the life insurance company $1,725.00 as a stand-by fee to obtain appellants' financing so that appellee would be paid off a total amount outstanding of $18,901.60 on the two assignments. (App. ~~289-294~~) A credit of $25.00 was given upon this note. (App. ~~290~~) At this point appellee had advanced:

$11,000.00	In initial transaction (App. 285, 300, 301)
1,750.00	In fourth transaction (App. ~~294~~)
$12,750.00	Total advanced by appellee

Appellee sought to collect as follows:

$ 2,900.00	Collected Oct. 21, 1966 (App. ~~256, 257, 258~~)
16,151.60	From first irrevocable assignment (App. ~~289, 290~~)
2,750.00	from second irrevocable assignment (App. ~~291~~)
$21,801.60	Total appellee sought to collect.

Thus as a result of the four transactions, appellee sought to collect in October, 1967, a total of $21,801.60 which was $9,076.60 more than the total amount of $12,750.00 he had advanced since April 1966.

The two irrevocable assignments were notarized, making it possible to record them as liens against the appellants' other properties. (App. 289, 290, 291, 292)
299, 300, 301, 302

Appellants received a letter from appellee's attorney dated September 12, 1967, (App. ~~261~~ 297) which was explained by appellee's attorney, who was a trustee under the deed of trust, as meaning that if assignments were not paid and foreclosure was held, assignments would be "disregarded" and "satisfied". (App. ~~216-219,~~ and App. ~~221-226)~~ 226-229
231-236

The appellee did foreclose on November 10, 1967. (App. ~~299)~~ 309
Two properties were bid in by appellee but no deposit was shown by him although terms of sale required a deposit of $1,000.00 for each property. The only deposit shown was $1,000 held by auctioneer on the third property bought by someone else. (App. ~~296)~~ 306
Appellee never made settlement on either of these two properties. (App. ~~38~~ 43, 159, 160, ~~299)~~ 309 The property at 1317 Riggs Street, N.W., was still owned by appellants at time of trial and the second trust subject of this suit was still recorded as a lien against this property at the time verdict was rendered against appellants.

From the third property secured under the blanket deed of trust, sold to someone else, appellee received $3,721.28 and his attorney, Jacob Sheeskin (also a trustee) received for trustees' fees $207.50. (App. ~~296, 297)~~
306, 307

Thus appellee himself has received payments totalling:

$2,875.00	October 21, 1966 (plus $25.00 paid his attorney Sheeskin by appellants)
3,721.28	from Auction sale (plus trustees received $207.50)
$6,596.28	*Cash paid to appellee against a total of $12,750.00 advanced by appellee.*

The appellee recorded the two irrevocable assignments for $18,901.60 in the Recorder of Deeds Office on January 19, 1968, and on the same day filed this suit against the appellants for $14,741.40. Shortly thereafter, the appellants did refinance other properties and they were required to assign $18,000.00 to the title company to cover the two assignments. This amount held by these assignments has been reduced by the lower court to $12,500.00, to be held in escrow pending determination of this matter.

The appellants then filed an answer in this suit and a counterclaim for slander of title to property, financial embarrassment, damage to reputation and credit, claiming fraud and usury on the two notes, and in Appellants' Amended Answer, the appellants claimed the appellee was loaning money at a rate greater than the legal rate and had not obtained a license to lend money as required by Title 26-601 of the D.C. Code and the Commissioners of the District of Columbia *Regulations for the Conduct of the Business of Loaning Money*, promulgated September 6, 1949. (App. ~~262-278~~ 272-285) The appellee admitted in his pretrial statement that he did not have a license to lend money.

The appellants claim that the first transaction (App. 279, 280) and the fourth transaction (App. ~~290~~ 289, 290) were money loaned and that the second and third transactions were extensions and postponements for which in each case an usurious and unconscionable bonus was exacted under threat of imminent foreclosure.

The appellee claims that the first transaction was the purchase of a note and that subsequent bonus amounts were to cover security amounts in event of demolition of a building (App. 13), for amounts due on first trusts (App. ~~22~~ 32), for interest, for taxes, and advertising costs, and for protection against costs if appellants' refinancing fell through. (App. 22) If amounts were not correct a verbal agreement was made whereby appellants would receive a refund. (App. ~~22~~, 32 25, 26, 49, 52, 58, 60, 61, 64, 65, 71) 35 36 59, 62, 68, 70, 71, 74, 75, 81

The Court refused to allow the appellants to introduce into evidence the Regulations of the D.C. Commissioners dated September 6, 1949, especially paragraph (i) (App. ~~264~~ 274) which defines "engaged in the business of loaning money" as "*one or more acts which result in the making or in the collection of a loan of money.*" The appellants claim the appellee made two loans, two extensions, two irrevocable assignments, and one collection. (Loans App. ~~279-284~~ 287-290; Extensions App. 286-288; two Irrevocable Assignments App. ~~289-292~~ 219-302; and one Collection App. ~~256-258~~ 266-265)

The appellants claim that the two loans and the two extensions were both usurious and unconscionable, that the appellee did not have a license to lend money, that the entire foreclosure was "illegal and void" under D.C. Code Title 28-3303, 26-601-611, and The Regulations for the Business of Loaning Money, taken together. The Court refused the appellants three instructions to the jury that the deed of trust was illegal and void if the notes were usurious and the appellee did not have a license to lend money. (App. 1-2, ~~254~~, R. ~~240-252~~) 350-262 264

Appellants claim that the two irrevocable assignments were procured by fraud and misrepresentation by appellee and his attorney Sheeskin in that it was represented by them that, in event of foreclosure, the assignments would be "satisfied" and "disregarded", and

that foreclosure and assignment *would not both be employed.* (App. ~~216, 217, 218, 219, 224, 225, 226, 227, 228, and 261)~~ 226, 227, 225, 234, 235, 236, 237, 238, and 271

The attorney, Sheeskin, for Appellee Mitzner, was a trustee on the deed of trust and ordered and conducted the foreclosure sales, and likewise charged and collected legal fees from appellants and a trustee's fee from the sale of one property. (App. ~~257, 259, 260,~~ 267, 269, 270 ~~296~~) 306 All negotiations and transactions were made in the office of the Appellee's attorney, Sheeskin.

The jury ruled that the case was the sale of a note, not a loan or loans of money and that the appellants were indebted to the appellee for $12,567.11. $1,080.00 was awarded as damages to the appellants for having $18,000.00 held by the title company for approximately one year, making a net judgment due the appellee for $11,487.11.

The appellants have filed timely appeal to this Court.

ARGUMENT

I

THE COURT ERRED IN NOT ALLOWING THE APPELLANTS TO INTRODUCE INTO THE EVIDENCE REGULATIONS OF THE D.C. COMMISSIONERS.

Title 26-601-611 of the D.C. Code is the so-called Loan Shark Act for those who loan money in the District of Columbia. Title 26-611 of the D.C. Code sets up the right of the D.C. Commissioners to pass such regulations for this Act. On September 6, 1949 the Commissioners passed such regulations which define "engaged in the business of loaning money" by Paragraph (i) which states that "one or more acts which result in the making or in the collection of money" is engaging in the business of lending money. (App. ~~264)~~ 274

The lower Court refused to allow this regulation to be submitted to the jury (App. ~~240-255~~), thus the jury was deprived of relevant evidence as to the appropriate standard of engaging in business. In the case of *Klein v. District of Columbia*, ___ U.S.App.D.C. ___, Case No. 21,879, decided February 27, 1969, this Court reversed the lower Court by holding "that the building code provision should have been admitted into evidence". This Court went on to say on the last page of this case, as follows:

> "However, by excluding the building code the trial judge deprived himself, as well as the jury, of relevant evidence as to the appropriate standard of reasonable sidewalk care. Therefore, we remand the case . . . ."

The Court erred by not admitting this Regulation since it is reasonable and not inconsistent with the Statute's goal of regulating money lending. Therefore, the Commissioners' regulations must be given the same effect as the Statute itself. 1 Davis Administrative Treatise Section 5.03.

In a tenant's action for personal injury sustained by ceiling falling under District of Columbia Housing Regulations which provides that no tenant shall occupy or permit occupancy of any habitation in violation of the regulations and the jury question was presented as to whether the landlord's breach of duty imposed by the regulation was negligence. *Whetzel v. Jess Fischer*, 108 U.S.App.D.C. 385, 281 F.2d 943 (1960). Also in *Richardson v. Gregory*, 108 U.S. App.D.C. 263, 281 F.2d 626 (1960) was an action for violation of the D.C. Traffic Regulations.

In other words, the regulations are part of our law if they are reasonable and not inconsistent with the Statute, and it is error to deny them from being admitted in the trial, as the jury was deprived of relevant knowledge and evidence.

Regulations are in truth elaboration and clarification of the laws themselves. Thus, regulations are an integral part of our laws and their admission necessary to fully understand the laws.

The introduction of the Regulations for the Conduct of the Business of Loaning Money states that "The several statutes above mentioned *were intended to be read together*, and they together with several other statutes, incorporated in the foregoing statutes by reference, constitute a comprehensive code for the business of loaning money in the District of Columbia." (App. ~~262, 263, 264~~) 272, 273, 274

The Regulations clearly define the words "loan of money", "interest", and "engaged in the business of loaning money" and the obligations of one who is licensed to lend money. The refusal of the Court to admit the Regulations denied to the jury the benefit of these definitions and standards, not only as regard to the legal requirements of the licensing law, but as to the conduct of the appellee and his attorney and also as to the meaning and understanding of the nature and significance of the transactions. (App. 263, ~~264~~, 273, 274 265, ~~267~~) 275, 277

Had the Regulations been admitted the jury could not have found that the second transaction was a sale of a note, and not a loan. An extension of six months for a total payment of $2,900.00 negotiated by the appellants and appellee together with the appellee's attorney in his office, and signed by both without intermediary of a straw party was a direct business deal between the appellee and appellants. There was not even a pretense of a sale, nor was there a note to be sold in this second transaction (App. ~~286, 287~~) since appellee Mitzner already held the note secured by the deed of trust, and no new note was involved at that time. 296, 297

Similarly, the third transaction could not have been mistaken for the sale of a note by the jury had the Regulations been admit-

ted. This was the raising of the amount claimed due of $12,500.00 plus interest to $16,151.60 for the forebearance of a foreclosure from September 12, 1967, to September 27, 1967, or a debt increase of several thousand dollars in return for the grant of a two-week delay of payment of $12,500.00 plus interest. (App. ~~289~~ 299

Likewise, the fourth transaction would have been clearly revealed as a loan, not the sale of a note, had the Regulations been admitted. This transaction was a loan of $1,750.00 for 30 days, for which appellants were obliged to sign, under threat of foreclosure, a note to repay $2,750.00. This transaction was a direct loan from appellee Mitzner through his attorney Sheeskin to appellants Baylies, and these are the names on the agreement. (App. ~~291, 292~~ 301, 302

All automobile cases that are based on negligence are proven by the Traffic Regulations, and the same holds true in housing for Housing Regulations, etc., since such regulations are too detailed and complicated to require separate statutes, such regulations are delegated to the D.C. Commissioners as in this case by Title 26-611 of the D.C. Code.

The Court claimed the appellants did not show that the appellee was engaged in the business of loaning money. (App. ~~242-249~~ 252-259 This should be a matter of fact for the jury to decide. The loan of a substantial sum of money where the intent is profit, and where no considerations of close personal relationship are involved, can only be a business transaction. To engage in a business transaction is to engage in business, no matter how short may be the time involved. The loaning of money for profit is engaging in a business transaction. Engaging in a business transaction which is the loaning of a substantial sum of money for profit is, in fact, engaging in business of loaning money. It is for this that the usury laws, the loan shark laws and the Regulations governing the conduct of the business of loaning money taken together were devised to protect the public.

The purpose of the Regulations and the Usury and Loan Shark laws is to protect the public against the skillful trickery of unconscionable businessmen and their attorneys who, combined together or separately, have an extensive knowledge and practiced skill in extracting money from the public above the legal rate of interest by a variety of devices, pressures, maneuvers and pretenses, and, while generally acting within the forms of law, manage, nevertheless, to evade the intent. (App. ~~69, 70~~) 79-80

Appellee Mitzner, using the offices of his agent and attorney, Sheeskin, where all of the transactions occurred, held himself out, through his agent and attorney, Sheeskin, and through his agent, Kamins, as having money to loan and in consequence of such holding out made two loans to appellants, plus two extensions. (App. ~~82, 83, 88, 90, 91, 92, 93, 24, 25, 26, 29, 31, 279, 280~~) 92

By denying the protection of the full measure of the law to appellants by refusing to permit admission of the Regulations, the Court permitted a confused jury to award $12,567.11 to appellee who had already collected $6,596.28 of the $12,750.00 total advanced. Appellee sought, through usurious loans, extensions and assignments, to collect a total of $21,801.60, but in the opening statement of his attorney in the trial, had reduced his claims, after previous collection of $6,596.28, to a remainder of $10,178.78 claimed owed. (App. 3) The jury so failed to understand the nature of the case that they awarded appellee $12,567.11, or approximately $2,500.00 more than appellee's attorney claimed was due. (App. 3)

The security interest in the second trust on the property at 1317 Riggs Street, N.W., still owned by appellants, may make it possible for appellee to collect from the judgment, and then again from the second trust lien on the property in event of sale by appellants or new foreclosure under more favorable circumstances. (It

would seem that where a security interest remains, no determination of a deficiency amount can be made, and no deficiency should, in fact, be awarded.)

Although the appellee denied engaging in the business of lending money and any previous transactions, the testimony revealed an extensive knowledge of devices by which far more than legal limit of interest could be extracted, and of ways to color, by devices and pretenses, the fact of usury and unconscionability. The confusing of the true facts in order to divert attention away from them to irrelevancies is one recognized device of loan sharks.

It is against the success of such devices tl at the laws and regulations were promulgated. To deny the full protection of the laws and regulations and thus permit such devices and evasions to succeed is inconsistent with the legislative intent and exposes the trusting public to the machinations of loan sharks operating by subterfuge. The refusal of the Court to grant appellants full protection of the law by admitting the Regulations was error and left appellants without legal protections to which they are entitled.

The result, if undisturbed by this Court, will be to permit appellee to recover a total of $19,096.28 as a result of four transactions involving an outlay by appellee of only $12,750.00.

It is contrary to both justice and the intent of law to permit appellee, for lending $12,750.00, using skillful pressures, confusions, misrepresentations, and devices of concealment and pretense, and with the aid of a confused jury, which failed to understand either the facts or the laws and the circumstances, to collect $19,096.26 from appellants, less $1,080.00 counterclaim.

It is against exactly this sort of fleecing operation that the usury and loan shark laws and the Regulations are intended to serve as protection for the public.

Against skillful loan sharks the public is at a tremendous disadvantage and needs every protection which the Regulations, the laws and the courts can afford. To deny the admissibility of the Regulations could result in clearly opening the door to a great increase in abuses by clever and unconscionable loan sharks operating behind a decision in this case adverse to appellants.

It should be remembered that only a very small percentage of money lending abuses ever reach the courts due to the evil skill of loan sharks in so misleading and financially weakening and confusing their victims that the victims have no comparable resources and understanding with which to fight back. Fighting for rights against money lenders is generally regarded as so time consuming and so expensive as to be hopeless and fruitless, regardless of the merits.

II

THE COURT ERRED IN NOT INSTRUCTING THE JURY THAT THE DEED OF TRUST WAS ILLEGAL AND VOID IF THE LOAN WAS USURIOUS AND THE APPELLEE DID NOT HAVE A LICENSE TO LEND MONEY.

The appellee admitted in pretrial stipulation that he had no license to lend money.

The appellants submit in their defense three cases of this Court.

(a) One is the case of *Royall v. Yudelevit*, 106 U.S.App.D.C. 1, 268 F.2d 577 (1959), which is substantially in point with this case. Here the Court granted a new trial so that the appellant could introduce evidence to show that the appellee was doing business in violation of the statute known as the Loan Shark Law which makes it unlawful and illegal to loan money at interest greater than six per cent. Here the Court said on pages 3 and 4:

> [2, 3] "Thus we held that a usurious loan contract with a lender who is violating the statute is ille-

gal and void and that proof of such violations should have been received; and that a deed of trust which is a product of such a void contract confers no title upon the trustees designated therein. We adhere to the views expressed in Hartman v. Lubar and hold that a borrower, who enters into a usurious contract which is void because the lender was violating the statute, may recover from the lender any damages sustained by reason of the void contract. A lender in a loan contract which is merely usurious may not be liable in damages. But if there is added to the situation the fact that the lender was not licensed as required by law, the loan contract is unlawful and void, and a foreclosure thereunder is wrongful and gives rise to an action for damages suffered therefrom".

Also on page 4 the Court said:

[6] "It follows that, if the transaction was a usurious loan by Yudelevit and if he was violating the statute by failing to obtain a license, the note and the second deed of trust were void; and, having made the foreclosure possible by transferring the void note and deed of trust, he is liable for the damages resulting from Simons' foreclosure (even if the latter was innocent throughout) unless he can establish an adequate affirmative defense.

[7] "If Simons took the note and deed of trust with notice or knowledge that Yudelevit had obtained them through a usurious loan contract made when he was violating the statute, then Simons unlawfully caused the foreclosure and is liable for any damages caused thereby, unless he can establish an adequate affirmative defense. As to Simons, the question is, not whether he was unlicensed, but whether he was a holder in due course.

> [8, 9] "We conclude that Mrs. Royall should have been allowed to prove, if she could, that the transaction was a usurious loan to her by Yudelevit, that Yudelevit was at the time in violation of the loan shark statute, and that she suffered damages as a result of the foreclosure. Such proof, standing alone, would authorize the jury to return a verdict awarding appellant damages against Yudelevit".

(b) The other case is *Indian Lake Estates v. 10 Individuals*, 121 U.S.App.D.C. 305, 350 F.2d 435 (1965), in which this Court reversed the lower Court under the Loan Shark Law (D.C. Code 26-601) as follows on page 311:

> [4] "We now consider a quite different problem, for the appellant additionally had relied upon D.C. Code 26-601 to 26-611, sometimes known as the Loan Shark Law. It is a licensing statute. In Hartman v. Lubar this court held that a usurious loan contract with a lender who was violating the licensing statute was illegal and void and that proof of the claimed violation should have been received. Thus, a borrower who had entered into a usurious contract, void because the lender was violating the statute, was entitled to recover from the lender any damages sustained by reason of the void contract.
>
> "The effect of a failure to comply with the licensing statute was again considered in Royall v. Yudelevit. This court then pointed out that a right of action for damages may flow from a loan which is (1) usurious and (2) granted by an unlicensed lender. Merely to state that appellant's claim in broad terms may suggest it need prove only that the appellees were engaged 'in the business of loaning money' without complying with the requirements of the licensing statute and had here entered into loans under which usurious interest had been exacted, as the result of

> which the appellant had suffered damage. It is clear, however, that this court's holding in the Royall case may apply only if the appellees cannot establish an adequate, affirmative defense."

Here the Court spelled out in clear language on Page 311 in the *Indian Lake Estates* case, supra,

> [5] "* * * It has likewise said that engaging in the business of lending money without being licensed to charge permitted rates is unlawful and illegal. And we have said that contracts illegally entered into under such circumstances are void, and that damages flowing from that type of transaction may be recovered unless the lender 'can establish an adequate affirmative defense'."

(c) These two cases follow the case of *Hartman v. Lubar*, 77 U.S.App.D.C. 95, 133 F.2d 44, (1942), *cert. denied* 319 U.S. 767.

Therefore, it seems clear that these three cases above would allow the appellants to show to the jury that the deed of trust was "unlawful and illegal" and "void" and "that damages flowing from that type of transaction may be recovered * * *".

The error committed by the Court is in not allowing the first three instructions offered by the appellants to be given to the jury, preventing the jurors from fully understanding the appellants' position, the nature of the transactions, and the appellee's actions, and was a prejudicial error. The Court claimed the appellants did not prove the appellee was engaged in business. (App. ~~242-249~~) The appellants showed four transactions and one collection. Four transactions are (1) $12,500.00 loan and it says on the note and deed of trust "for money loaned" (App. ~~279-280~~), (2) extension dated October 21, 1966 (App. ~~286-287~~), (3) another loan for $2,750.00 (App. ~~290~~), (4) extension dated September 12, 1967 (App. ~~287~~-

252-259

289-290

296-297
300

297

198 288) and (5) the collection of $2,900.00 paid to the appellee (App. 266-265 256-258). Likewise, if the Court had allowed the appellants to admit the Regulations of the D.C. Commissioners which is paragraph (i), then this would have settled the question of whether the appellee was engaged in business. Thus, the jury was restricted on what evidence and instructions that should be given to them and the appellants were prejudiced by the Court's ruling.

It appeared that the Court reached the decision of saying the appellants did not prove the appellee was engaged in the business of loaning money by certain decisions which were decided before the Commissioners passed the present regulations, which were passed on September 6, 1949. The Court seemed to rely on *Zirkle v. Daley*, 60 U.S.App.D.C. 344 (1931), which said in substance that an occasional purchase of a second deed of trust did not amount to being engaged in business and this was *eighteen years* prior to the Regulations of 1949. Also the Court seemed to rely on *Von Rosen v. Dean*, 59 U.S.App.D.C. 359 (1930), in which it was stated that the Loan Shark Act was intended to apply only to persons making small loans upon personal security, limited to $200.00. Whereas, the *Indian Lake Estates* case, supra, which was decided in 1965 and the amount involved was $2,125,819.31. Thus, it is a definitive reversal of the $200.00 limitation.

Also in a 1942 case, *Knott v. Jackson*, 31 A.2d 662, the Court held five cases was not sufficient to warrant finding that the lender was engaged in business. This was *seven years* before the Regulations were passed.

Whether the appellee was engaging in the business of loaning money was a matter of fact for the jury to decide.

III

THE COURT ERRED IN NOT GIVING THE APPELLANTS A NEW TRIAL AS THE VERDICT IS CONTRARY TO THE EVIDENCE AND IT IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

This is a case of usury, unconscionability, coercion, deceit, and deliberately created confusion and fraud to conceal the facts and permit the appellee to collect usurious and unconscionable sums for money loaned in violation of D.C. Code Titles 26-601-611, 28-3303, 28-2-302, and the Commissioner's Regulations for the Conduct of the Business of Loaning Money, promulgated September 6, 1949.

1. In the first transaction, April 20, 1966, the loan of $11,-000, less costs, the appellee required in consideration that the appellants sign a note for $12,500.00 plus 6% interest for six months.

2. In the second transaction, October 1966, for an extension of six months more, appellee required appellants to pay $2,900.00 which they did pay.

3. In the third transaction, September 12, 1967, for forebearance of imminent foreclosure for 15 days appellee required appellants to sign and they did sign an irrevocable assignment raising amount of trust obligation of $12,500.00 (face) plus interest to $16,151.60. This was an increase of debt of several thousand dollars for a grant of two weeks time.

4. In the fourth transaction, September 26, 1967, for a loan of $1,750.00 and forebearance of foreclosure for 30 days appellants were obliged to sign a note and irrevocable assignment for $2,750.00 or a bonus of $1,000.00 for use of $1,750.00 for 30 days (less a credit of $25.00).

The note in the first transaction stated on the face that it was "given for money loaned". (App. 279) Monies loaned by appellee were:

	$11,000.00
plus	$ 1,750.00
or a total of . . .	$12,750.00 loaned.

For this $12,750.00 loaned appellee sought to collect a total of:

	$18,901.60 from irrevocable assignments
plus . . .	$ 2,900.00 paid by appellant in October 1966 for six month's extenion for a grand
total of totalling	$21,801.60 or a profit amounting to $9.051.60 on loans $12,750.00.

The technique employed was to make short term maturity dates, virtually impossible of fulfillment, and then to exact large bonuses to delay threatened foreclosure on maturity.

Irrevocable assignments were required on September 12, 1967 to delay foreclosure until September 27, 1967 increasing face amount due from $12,500.00 to $16,151.60. On September 26, 1967 an additional $1,750.00 was loaned for which appellants were obliged to sign a second irrevocable assignment in the amount of $2,750.00 due in 30 days.

Appellee's attorney, a trustee on the deed of trust, and who collected legal fees from appellants in these series of transactions, represented to appellants that the irrevocable assignments would be used *or* that foreclosure would be held, but *not that both would be used*, and gave a letter to that effect, purported to state this (App. 271 ~~261~~), and further gave appellants verbal assurances and explanations to this effect. *No evidence was offered by the attorney for the*

appellee to dispute testimony of this conversation which took place in his office September 12, 1967, and by which the appellants were induced to sign the first irrevocable assignment, and later the second irrevocable assignment.

When the refinancing of appellants' other properties dragged out, appellee foreclosed on November 10, 1967 on the appellants' properties, bought in two of them but never made settlement. One property was still titled in appellants at conclusion of trial and award of judgment against appellants for $12,567.11, and the second trust is still a lien against it as of date of this appeal.

From the foreclosure of the property sold to another, appellee received:

	$3,721.28
He had collected earlier in October 1966	$2,900.00
	$6,621.28 Total collected by appellee.

Contrary to assurances, both verbal and written, not only did appellee foreclose on properties but he used the assignments against appellants by recording them in the Office of the Recorder of Deeds as liens against the appellants' properties. He recorded both the assignments for $16,151.60 and in addition the assignment for $2,750.00 for a total of $18,901.60. Yet on that same day he filed suit for a deficiency judgment in the amount of $14,741.40, an amount far less than even one of the assignments. This was done with malice to attempt to collect even more than was claimed owed, through duress and coercion, and with utter disregard of prior representations and of the rights of the appellants (App. 66), and despite prior collection of $6,621.28. (App. ~~256, 257, 258, 296, 297~~ 266, 267, 268, 306, 307)

Although the appellants had exerted their utmost efforts to meet the exorbitant demands of appellee Mitzner, the recording of the assignments for far more than was claimed owed was the straw that finally forced appellants to resort to legal protection. Action of appellee was unnecessary, malicious, intentional, and damaging to appellants. (App. ~~66~~ 76

When appellants finally, in February 1968, refinanced other property the assignments forced a withholding of $18,000.00 by the title company, harming the appellants' position greatly, at a time when they needed this money to pay back bills and resume gainful operations and medical treatments, which the tying up of the $18,000.00 prevented them from doing.

It is important to note that in regard to the second transaction held in October 1966 the bonus paid of $2,500.00 was claimed by appellee to be for "security" held in event of demolition of property which has never been demolished (App. ~~49~~, and thus cannot be properly assessed as a charge against the defendants even if this were true and it were not in reality a bonus for the extension of the note. This $2,500.00 should be credited to appellants. (App. 47, 48, 49, ~~52~~) 62

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57, 58, 59

The third and fourth transactions each contained large bonuses which were explained as security amounts (App. 52, ~~71, 65~~), payments to be made to first trusts, which payments were never made, taxes, which were never paid, and additional costs and legal fees. (App. ~~49-58~~) The same advertising costs were included as charges in each of the third and fourth transactions. (App. ~~52, 58, 59, 60, 61, 64, 65~~) None of these "security" sums, for contingencies which did not occur, should be made a cost to the detriment of the appellant and to the benefit and profit of the appellee, yet in the judgment rendered by the lower court, all of these "security" sums, to be

62, 81, 75

59, 65

62, 65, 69, 70, 71

74, 75

"refunded" were included in the award to appellee, without deduction of any kind.

Thus, since the appellants had to litigate, they should not be liable for more than the return of the unpaid balance of the principal of $5,828.72 if any of the four transactions are found to be usurious.

If the attorney for the appellee had been more discreet, he would only have filed one of the assignments which would be the $16,151.60 assignment and file a credit to the maximum of the suit which was $14,741.40. But no, the appellee maliciously and with utter disregard to the rights of the appellants did attempt to coerce the appellants in exacting more than his share of any balance that could possibly be due.

It also should be noted that the attorney for the appellee in his opening statement said "the balance due Mr. Mitzner is $10,178.78 plus interest from November 10, 1967." (App. 3) This is substantially different from the $12,567.11 awarded by the jury since interets on $10,178.78 would not be this amount, and the award was $2,500 more than plaintiff claimed was owed.

The most flagrant, fraudulent and unethical part of this transaction was inducing the appellants to sign two irrevocable assignments and then both foreclosing and then recording the assigments in an effort to collect far more than was claimed owed. To understand fully what took place on September 12, 1967, the letter of Jacob Sheeskin, the attorney for the appellee and trustee on the deed of trust which the appellants signed, must be read. (App. ~~261~~ 271) In substance this letter said, according to the testimony of the appellants (App. ~~222-225~~ 232-235), that if the appellants signed this irrevocable trust and they could not refinance other properties to pay the appellee, then the assignment of those funds from refinancing would be "sat-

226-229 231-236

isfied" and "disregarded". (App. ~~216-219~~, App. ~~221-226~~) In short, the appellants were induced to believe that by signing the irrevocable assignment, the foreclosure would revoke the assignment, *and that both remedies would not be used against them.* This letter was confusing, but it was written by an experienced attorney, also a trustee under the deed of trust, who was dealing with the appellants who were not at this transaction represented by counsel, but who had their backs to the wall. The appellants claim misrepresentation, unconscionability and fraud on the part of the attorney for the appellee. *No evidence was offered by the attorney for the appellee to dispute testimony of what conversation took place in his office on September 12, 1967, when the appellants consented to signing the irrevocable assignments.*

After all, Mr. Sheeskin was the agent and attorney for the appellee, the *trustee* in the deed of trust, the one who prepared the deed of trust, and who had required payment for legal costs from appellants. It was his secretary who was the payee under second deed of trust. She did not advance any money or receive any consideration. Appellee's attorney, Sheeskin, was dealing with a husband and wife in his office, where all of the transactions were made, who were not represented by counsel. In short, he was under a fiduciary relation with the appellants. He was paid $25.00 by the appellants when the first extension was made and later he charged an attorney's fee in the irrevocable assignment signed by the appellants. This is a serious conflict of interest. The above letter given by Mr. Sheeskin to induce the appellants to sign the irrevocable assignments was intentional fraud as Mr. Sheeskin was the agent of the appellee.

To further show that this verdict is contrary to the evidence, the $12,500.00 second deed of trust at 6% and balance due six months after date was "given for *Money Loaned*" as stated on the

259-290

note and deed of trust. (App. ~~279~~ 280) The appellee claims he purchased this note, but in the Pretrial Statement it was stipulated that "*no consideration was paid to said payee Ferguson on account of said note*". Therefore, the appellee is not a holder in due course as required by Title 28:3-301 D.C. Code since no consideration was paid to the payee. The payee was admittedly only a straw. Thus, it was usury per se, since the appellants only received $11,000.00 less expenses of settlement. In addition, the appellants paid $2,900.00 for an extension for six months to prevent foreclosure and in *Von Rosen v. Dean*, supra, on page 360, this Court said "that money exacted by the lender from the borrower for the use of money in excess of the legal rate allowed by statute is usury under whatever name or pretense the exaction, *extension*, or forebearance may be designated". This applies equally to the two assignments.

Also in *Quinn v. National Mortgage & Investment Co.*, 61 App. D.C. 45, 57 F.2d 410 (1932), on page 46 the Court said:

> "For the purpose of avoiding the usury statutes, an intermediary was employed, and the trust in the sum of $10,000.00 was made payable to him, whereupon, in pursuance of the predetermined plan, he professed to sell the same to the actual lender for the sum of $9,300.00 and this sum was paid as the real amount of the loan to the actual borrower. Such a transaction is fictitious, and is not sustained by the Courts."

Also the appellee's charges were unconscionable in recording liens in excess of the law suit and for excessive interest and extension charges. In *Williams v. Walker-Thomas Furniture Co.*, 121 U.S.App. D.C. 315, 350 F.2d 445 (1965) speaks of where element of unconscionability is present at time contract is made, contract should not be enforced.

Now the fourth transaction could not be a purchase as this note was for $2,750.00 and *payable by appellants to the appellee at 6% and due thirty days later*, and the appellee loaned only $1,750.00 for this. This is usury per se; it is a loan at exorbitant interest (over 600%).

Therefore, the appellants claim from reading entire transcript of the testimony that the verdict is contrary to the evidence and it is not supported by the weight of the evidence.

CONCLUSION

The appellants pray that this Court grant them the following:

(1) A new trial so that the D.C. Regulations can be submitted to the jury so that appellants can have full protection of the money lending controls, or,

(2) A finding of this Court that declares the second deed of trust note illegal and void because it was usurious and the appellee did not have a license to loan money; or,

(3) That the Court find all, or any one or more, of the four transactions to have been usurious or otherwise contrary to law, and to grant a new trial or such other relief as the Court feels appropriate, or,

(4) That this Court find error by inclusion in the lower Court's award of large sums which appellee claimed for purpose of "security" to be "refunded"; or,

(5) An opinion that the verdict is contrary to the evidence and not supported by the weight of the evidence and thus grant the appellants a new trial.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,907

ERNEST S. MITZNER,

v.

WILLIAM C. BAYLIES, *et al.*,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

During the month of April, 1966, the Appellee (Plaintiff below) was approached by one Irving Kamins who told the Plaintiff that he had a second trust note available for purchase at a discount. The note had a face value of $12,500.00 and could be purchased for a net sum of $11,000.00. Kamins told the Plaintiff that the note was made by William Baylies and was secured by a second deed of trust on an empty lot in the 1500 block of Corcoran Street, Northwest, as well as on a building at 1317 Riggs Street and at 1342 Riggs

Street, Northwest (App. 16). The Plaintiff went to look at the property described by Kamins and upon being satisfied with the looks of the property, he instructed Kamins to contact his attorney and arrange for a search of the title (App. 17). The Plaintiff had never purchased a second trust note before and he had not instructed Kamins or anyone else to find a note for him to buy (App. 17). And neither did the Plaintiff pay Kamins or anyone else a commission for finding him the second trust note (App. 20).

The Plaintiff first met the Defendants in the Plaintiff's attorney's office on April 20, 1966. Prior to that date, he had never had any conversation with either of the Defendants over the telephone or in any other way; he had never discussed the terms of the note with either Defendant nor had he ever discussed making a loan to the Defendants (App. 21, 22). On April 20, 1966, the Plaintiff learned that the title search had revealed that no second deed of trust had, as yet, been recorded against the property (App. 21). On April 20, 1966, the Plaintiff delivered a check for $11,000.00 to his attorney with instructions that the check was to be used in payment for the purchase of a $12,500.00 promissory note (App. 19-20). The deal was concluded and the Plaintiff received the $12,500.00 note secured by a second deed of trust on the three pieces of property above mentioned. The note and the deed of trust were introduced into evidence as Plaintiff's exhibit 1 and 2 and may be found on pages 289-294 of the Appendix.

The note recited that the entire principal amount and accrued interest was due and payable on the 20th day of October, 1966.

In October of 1966, the Defendant, William Baylies, informed the Plaintiff that he was not able to meet the payments on the date specified in the note. The Defendant offered to pay the interest of $375.00. He also told the Plaintiff that he would like to have permission to tear down the house at 1317 Riggs Street so that he

could turn it into a parking lot and have it re-zoned for commercial property. When the Plaintiff questioned him about what would happen to the security value of his deed of trust, the Defendant offered to give the Plaintiff a sum of $2,500.00 as consideration for the permission to tear down the property at 1317 Riggs Street (App. 22-23; 58-59). The Plaintiff agreed to accept the sum of $2,500.00 as consideration for permission to raze the building at 1317 Riggs Street and the Plaintiff further agreed to extend payment of the note for an additional six months to April 20, 1967 (App. 23). A written extension agreement was executed by both parties and was introduced into evidence as Plaintiff's exhibit number 4 (App. 296-297). The note extension agreement contained the following language:

> "It is understood and agreed that should the makers of the note present an agreement in writing from the holder of the note secured by first deed of trust on lot 62 in square 239 approving the demolition of the improvements on said lot, that the holder of this note will approve in writing the demolition of improvements on said lot insofar as his interest in the second trust is concerned."

The note was not paid on April 20, 1967. The Plaintiff tried to contact Mr. Baylies by telephone and by registered mail. Finally, he did get in touch with him and asked for his money. Baylies said that he could not pay it. The Plaintiff kept extending the due date of the note verbally until August, 1967 when Mr. Baylies indicated to him that he had a settlement in progress on a piece of property on 14th Street, Northwest. This settlement was in the form of a refinancing of the 14th Street property and the settlement was to be held at the offices of Lyon, Roache & Horan. The Defendant then stated that after the settlement he would have plenty of money to pay off the Plaintiff's note. The Plaintiff, however, had insti-

tuted foreclosure procedure on his second trust note prior to this conversation with Baylies in August, 1967 (App. 26-27).

After his conversation with Baylies, the Plaintiff instructed his attorney to contact Lyon, Roache & Horan to determine whether a refinancing on the 14th Street property was indeed in progress. As a result of the attorney's investigation, the Plaintiff agreed to extend the foreclosure until September 27, 1967 (App. 28). On the 12th day of September, 1967, a note extension agreement was signed by both parties and was introduced into evidence as Plaintiff's exhibit number 5 (App. 297). On the same date, the Defendants gave to the Plaintiff an irrevocable assignment to Lyon, Roache & Horan for $16,151.60 (Plaintiff's exhibit number 6, App. 299). This assignment was to assure payment of the $12,500.00 balance due on the Plaintiff's note; interest on the principal balance from October, 1966 to date the assignment was to be honored; the arrearages on the first trust on the several pieces of property in case the Plaintiff had to advance sums to protect his second trust; taxes that were in arrears on the several pieces of property; and expenses incurred by the Plaintiff in advertising the property for foreclosure (App. 32, 61-62). The parties also agreed that if the Plaintiff collected the $16,151.60 on the assignment and if all of the money was not used to cover expenses incurred by the Plaintiff, there would be a refund to the Defendants of any amount left over (App. 32, 62). On September 12, 1967, the Defendants received from the attorney for the Plaintiff a letter acknowledging receipt of the above described assignment and stating that the foreclosure had been postponed until September 27, 1967. The letter went on to say that "if Lyon, Roache & Horan can assure us by 5:00 p.m. on September, 1967 that the sum of $16,151.60 is available to be disbursed to this office, we will cancel the foreclosure proceedings. If on the other hand, the money is not available, and foreclosure is held on September 27, 1967, we will notify Lyon, Roache & Horan that the assign-

ment has been satisfied by other means and that they can disregard it" (App. 271). Foreclosure was not held on September 27, 1967. Foreclosure was not held because on September 26, 1967, Defendants notified Plaintiffs that the deal for the refinancing of the 14th Street property had fallen through. They stated, however, that they had an opportunity to refinance the property through an insurance company provided they could raise a standby fee of $1,750.00 and that the Plaintiff was the only person they could turn to to get money (App. 34). The Defendants informed Plaintiff that they were supposed to obtain refinancing on the 14th Street property in the amount of $175,000.00 and out of that sum would come the money to pay all amounts due the Plaintiff. Plaintiff agreed to advance the sum of $1,750.00 provided he received a note for $2,750.00 and an additional assignment in the amount of $2,750.00. The Additional $1,000.00 was to protect the Plaintiff for additional advertising expenses he had incurred in advertising the property for foreclosure; to cover his additional legal fees; and to cover real estate taxes which were to become due on the property during the month of September. The Plaintiff further agreed that should he collect the sum of $2,750.00 from the refinancing of the 14th Street property, he would refund to the Defendants all amounts in excess of that necessary to reimburse his $1,750.00 for the standby fee and for the additional expenses incurred by him (App. 35-36, 75). In addition to the note of $2,750.00 and the assignment for $2,750.00, the parties entered into a written extension agreement extending the due date of the original note until October 26, 1967 (App. 37, 302-303).

The Plaintiff's note was not paid on October 26, 1967. He contacted Mr. Baylies who informed him that the deal for the refinancing of the 14th Street property had fallen through (App. 41). The note was not paid at any time and the Plaintiff instructed the trustees to institute proceedings for foreclosure of the property.

Foreclosure was held on November 10, 1967 (App. 42) and the Plaintiff realized $3,721.28 from the foreclosure sale (App. 44). The suit for deficiency judgment was instituted shortly thereafter.

Jack W. Reiss was called as a witness for the Plaintiff. He testified that he never met the Plaintiff until he appeared in Court that day (App. 87). He further testified that he knew Mr. and Mrs. Baylies very well and had known them for at least five years (App. 87). In the spring of 1966, Mr. Baylies had called the witness on the telephone and told him that he wanted to sell a note on property on Corcoran Street and Riggs Street in the amount of $12,500.00. Baylies said that the note was for six months and he wanted to net $10,000.00 (App. 88-89). The witness called several investors to see if they would be interested in purchasing the note described by Baylies and, in the course of calling possible note buyers, he telephoned Mr. Irving Kamins and offered the note to him. Kamins called him back several days later and said that he would be interested in handling the note (App. 91).

Irving Kamins testified that Jack Reiss had telephoned him and told him he had a second deed of trust note for sale and asked if Kamins knew of someone who would purchase it. Reiss explained to him that the note was for $12,500.00 for six months at 6% interest and that Reiss' principal was willing to sell it for $11,000.00. Kamins and Reiss were to be paid a commission of $1,000.00 if they could consummate a sale of the note. Kamins contacted the Plaintiff, whom he had known for several years, and told him he had a note for sale. Kamins described the note and a few days later the Plaintiff came back to Kamins and told him that he would be interested in purchasing the note for $11,000.00. The Plaintiff told Kamins that he wanted his attorney to search the title and upon satisfactory title examination, he would proceed with the settlement. Kamins learned from the Plaintiff's attorney that the title search

revealed that no second trust was on the record. Kamins discussed this with Mr. Reiss who suggested that the attorney draw the note and the deed of trust (App. 87-98). At this point, Kamins had never met either of the Defendants (App. 99).

The Defendant Baylies, on cross-examination, admitted that the whole transaction involved in this case started with a telephone call by him to Jack Reiss (App. 186). He also admitted that he had never heard of Mr. Mitzner nor had he ever discussed the terms of the deal with him. The only person he had ever discussed the terms of the deal with was Mr. Reiss (App. 189). The Defendant also admitted that he agreed to pay Reiss a commission (App. 189).

Before resting his case, counsel for Defendant offered into evidence regulations promulgated by the Commissioners of the District of Columbia for the conduct of the business of loaning money. The regulations are printed on pages 272-288 of the Appendix. Plaintiff objected to the introduction of the regulations on the ground that Defendants had failed to prove that the Plaintiff had engaged in the business of loaning money upon which the rate of interest was greater than 6% per annum. The Court sustained the objection on this basis (App. 251-262).

Prior to submitting the case to the jury, the Court and counsel met in chambers and agreed that the case would go to the jury on two bases, one, if the jury finds that this was a sale at discount as distinguished from a loan, the figure which the Plaintiff would be entitled to would be $12,567.11; whereas, if the jury finds on the theory that this was a loan as distinguished from a sale, the amount recoverable would be $6,377.11. Counsel further agreed that as to the Defendants' counterclaim that the damages would be dividable in two parts: if the Defendants should prevail under their counterclaim, they would be entitled to special damages in the amount of $1,080.00 and they would also be entitled to punitive

damages in the amount decided by the jury if the jury should find facts which would entitle the Defendants to punitive damages (App. 264-265).

The case was then submitted to the jury and the jury returned a verdict in favor of the Plaintiff in the amount of $12,567.11 and in favor of the Defendants on the counterclaim in the amount of $1,080.00.

ARGUMENT

I.

THE COURT ERRED IN NOT ALLOWING THE APPELLANTS TO INTRODUCE INTO THE EVIDENCE REGULATIONS OF THE D.C. COMMISSIONERS.

The Loan Shark Act for the District of Columbia states: "it shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than 6% per annum is charged * * * without procuring license." Title 26-601 D.C. Code. It is well established that the party who alleges a violation of this Act has the burden of proving it. *District of Columbia v. Hamilton National Bank*, D.C. Mun. App., 1950, 76 A.2d 60. The Courts in this jurisdiction have always required as a part of the burden of proof of the person alleging violation of this statute a showing that the alleged "Loan Shark" was engaged in the District of Columbia in the business of loaning money at a rate of interest in excess of 6%. *Hartman v. Lubar*, 1941, 77 U.S. App. D.C. 95; *Knott v. Jackson*, 32 A.2d 662; *Zirkle v. Daly*, 60 App. D.C. 344.

At the trial of the case at bar, Judge Keech ruled that the Defendants had failed to sustain the burden of proof required by the D.C. Code and by the authorities and therefore the Loan Shark

Act and the regulations promulgated by the D.C. Commissioners to amplify the Act were not admissible (App. 251-262). The trial court was amply supported by the authorities. In *Zirkle v. Daly, supra,* this Court held that a nonresident who makes occasional loans on real estate in the District is not engaged in the business of loaning money within the meaning of the Loan Shark Act. The Plaintiff in the case was a nonresident of the District of Columbia. There is no evidence that he ever held himself out as a moneylender nor that he had an office within the District of Columbia for the purpose of loaning money. The only evidence presented to the Court was the purchase of the second trust note in this case and the other transactions which were related thereto. It must be borne in mind that all of the subsequent transactions pertained to extending the time of the original second trust note purchased by the Plaintiff and were not in any sense of the word additional loans or additional transactions. All of the subsequent dealings between the parties were caused by the Defendants' failure to pay their note on its due date. The Defendants now seek to use their numerous failures to honor their obligation to pay the note as a weapon to make the note completely unenforceable. They claim that the Plaintiff's efforts to protect himself and to endeavor to collect his money are additional transactions which prove the Plaintiff was engaged in the business of loaning money in violation of the Loan Shark Act. This argument is completely unconscionable.

The Municipal Court of Appeals for the District of Columbia has held that evidence of five different loans was not sufficient to warrant a finding that the alleged violator of the Loan Shark Act was engaged in the business of loaning money within the meaning of the Act. *Knott v. Jackson, et al., supra.*

The 1st Circuit has held that engaged in business means more than a single isolated transaction. It must be a course of action or

professional practice, not a single isolated act arising from unusual circumstances. *Dane v. Brown*, 70 F.2d 164.

The excluded regulations themselves do not help the Defendants since they merely emphasize the fact that the Defendants have failed to sustain their burden of proof. Section 1(i) of the regulations states (App. 274):

> "The words 'engaged in the business of loaning money' mean the holding out in the District of Columbia, by the maintenance of a place of business in the District of Columbia or in any other manner, that a loan or loans of money may be effected by or through the persons so holding out, plus the performance in the District of Columbia by such person of one or more acts which result in the making or in the collection of a loan of money."

The Defendants utterly failed to prove any holding out of any type by the Plaintiff that he was in the business of loaning money. The evidence was very clear that the Defendants' agent, Reiss, contacted Kamins who in turn interested the Plaintiff in purchasing a note. Both Kamins and Reiss acted for the Defendants and were paid a commission by the Defendants. Since the Defendants failed to sustain the burden of proof which would entitle them to proceed under the Loan Shark Act, the trial Court was without error in failing to receive the Loan Shark regulations into evidence.

The jury's finding, however, makes the point moot. The question was submitted to the jury to decide whether the Plaintiff had, in fact, purchased a note, or whether he had made a loan. The jury specifically found that the Plaintiff had purchased a note. Before the Loan Shark Act could apply in any circumstances, the jury must first find a loan of money.

II.

THE COURT ERRED IN NOT INSTRUCTING THE JURY THAT THE DEED OF TRUST WAS ILLEGAL AND VOID IF THE LOAN WAS USURIOUS AND THE APPELLEE DID NOT HAVE A LICENSE TO LEND MONEY.

This assignment of error is substantially similar to the Defendants' first assignment of error. The Appellants argue that their position is supported by the case of *Royall v. Yudelevit*, 106 U.S. App. D.C. 1, 268 F.2d 577 (1959). This case, however, supports the Appellee's position since the Court reversed the Royall case on the sole ground that the trial judge had failed to give the Plaintiff an opportunity to prove that the Defendant was engaged in the business of loaning money in violation of the Loan Shark Act. The other case cited by the Appellant also affirms the Appellee's position that the Appellants must first prove that the Appellee was engaged in the business of loaning money. *Indian Lake Estates v. 10 Individuals*, 121 U.S. App. D.C. 305, 350 Fed. 2d (1965).

III.

THE COURT ERRED IN NOT GIVING THE APPELLANTS A NEW TRIAL AS THE VERDICT IS CONTRARY TO THE EVIDENCE AND IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Justice Cardozo once said, "The reverberating clang of the accusatory word drowns all lesser sounds." In their brief, the Appellants recklessly hurl accusations against the Appellee and his attorney. They accuse them of usuary, malice, unethical practices, conflict of interest, and coercion in a thinly veiled attempt to drown out the facts of this case. They say that the verdict is contrary to the evidence and to the weight of the evidence because the Plaintiff's attorney in his opening statement claimed the amount of

$10,178.78 to be the amount due. They completely ignore the fact that this figure is the balance that was due on the original note of $12,500.00 and did not include the $1,750.00 later advanced by the Plaintiff as a standby fee. Neither did it include additional advertising expenses incurred by the Plaintiff. Opening statements of counsel are not evidence in the case. It is standard practice in our Courts for the judge to instruct the members of the jury that they are to consider only testimony they have heard from the stand and the exhibits which have been admitted into evidence. The Court also instructs that statements of counsel are not evidence. The transcript of proceedings clearly reveals that the Court and counsel met in chambers prior to the case going to the jury and both parties agreed on the possible verdicts. The parties agreed that if the jury should find a purchase of a note as distinguished from a loan, the Plaintiff would be entitled to a verdict in the amount of $12,567.11. The parties also agreed that if the jury found that the transaction involved in this case was a loan as distinguished from a sale of a note, then the amount recoverable by the Plaintiff would be $6,377.11 (App. 265). On appeal, the Appellants seek to breach this agreement and ask this Court to ignore the fact that the jury was instructed as to the possible verdicts upon stipulation of counsel. The trial Court very carefully and very thoroughly instructed the jury. Not a single objection to the judge's charge was made by counsel for Appellants. In fact, the Appellants were so satisfied with the charge that they didn't even bother to have the charge transcribed as part of the record of this case. The jury decided the factual issues presented to them within the framework of the law as outlined by the trial judge. An Appellate Court cannot disturb the jury's findings.

Appellants claim the verdict should be set aside because of the malice of the Appellee and his attorney. Yet, the question of malice was presented to the jury as a factual issue. It is evident

that the jury found no malice since it did not award punitive damages although it did award $1,080.00 as compensatory damages on the Appellants' counterclaim.

Appellants claim that the Appellee "employed a technique of making short-term maturity dates, virtually impossible of fulfillment." Yet, the evidence is very clear that all of the maturity dates were the dates requested by the Appellants and based upon their promise to pay their obligation with money they were to receive in refinancing another piece of property on 14th Street.

The Appellants constantly harp on the fact of two irrevocable assignments and stress the position that the irrevocable assignments were in addition to the notes already received by the Appellee. The evidence is very clear, however, that the purpose of the irrevocable assignments was to give the Appellee assurance that the money received from the refinancing of the 14th Street property would be used for the purpose of paying off his loan and for no other purpose. The assignments were also given as additional inducement to the Appellee to cancel imminent foreclosure proceedings and to extend the due date of his note. It was clear that by extending the due date on his note, the Appellee was in danger of having his second trust wiped out by the first trusts on the property which were substantially in arrears and threatening to foreclose. The additional sums in the irrevocable assignments were to protect the Appellee in case he was compelled to pay money to the holders of the first trust in order to protect his second trust (App. 32, 61-62). Of course, the Appellants' version of the purpose of the assignment differs from the Appellee's version. The differing positions raised a factual question which was properly presented to the jury. The jury apparently believed the Appellee's explanation over the Appellants' explanation. It is the province of the jury, as the trier of facts, to determine the credibility of the witnesses and the weight to place upon their testimony.

CONCLUSION

The Appellee respectfully submits to this Court that the trial judge did not err in any of his rulings and that the judgment of the Court below should be affirmed.

Respectfully submitted,

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July 1969.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,907

ERNEST S. MITZNER

v.

WILLIAM C. BAYLIES, *et al.*,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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The appellee (Mitzner) is not a holder in due course for value since it is admitted in the pretrial statement that *no consideration was paid to the payee (Ferguson) for the notes.* Therefore, *as a matter of law*, the appellee could not be a holder in due course. Title 28:3-302, Title 28:3-307(3), D.C. Code 1967, and *United Securities Corp. v. Bruton*, 213 A.2d 892 (1965). Therefore, under this code provision (Title 28:3-307(3)) the appellee is not a holder in due

course since no consideration was paid to the payee (Ferguson, an employee of appellee's attorney) and since appellee did not establish "that he, or some person under whom he claims, is, in all respects, a holder in due course since the payee (Ferguson) did not take the notes for value" as required in Title 28:3-302(1)(a) and (b).

No evidence whatever was offered to show that payee (Ferguson) ever gave any consideration to the obligors (appellants Baylies) for said notes. Title 28:3-305 provides that want or failure of consideration is a defense as against *any* person not having the rights of a holder in due course. The assignee of an ordinary credit stands in the same position as the assignor, so that if the maker of the note has any legal defenses, he can assert all defenses against the assignee that he could have asserted against the creditor.

Since *no consideration* was given by payee (Ferguson) to obligors (Baylies) for the notes it is apparent that payee (Ferguson) did not lend to the Baylies $12,500, as recited on the face of the note, nor did Ferguson lend Baylies any amount of money whatsoever.

Since no consideration passed from payee (Ferguson) to obligors (Baylies), and since no consideration passed from assignee Mitzner to assignor (Ferguson) for the notes, it is apparent that Mitzner could not have completed a purchase of the notes from payee (Ferguson) at a discount or otherwise. From whom, then, did he purchase the notes, if purchase the notes he did?

For failure of consideration as between Ferguson (payee) and Baylies (obligor) , she (Ferguson) acquired no title in the note and was thus unable to assign title in notes to Mitzner since she had none. Similarly for failure of consideration between Mitzner and Ferguson (payee), Mitzner acquired no title from her.

The consideration given for the note was $11,000 that Mitzner gave to the obligors (Baylies) through his attorney Sheeskin.

> " . . . the money that I was giving them [Baylies] was to secure a deed of trust on three pieces of property, and this is the intent I had when I gave them the money." (App. 54)

Since no legal consideration passed between obligors (Baylies) and and payee (Ferguson), nor between assignor (Ferguson) and assignee (Mitzner), the true transaction was between Baylies and Mitzner, a usurious loan of $11,000 in return for secured agreement to repay $12,500 plus interest in 6 months.

The record shows that Mitzner's check was cashed April 21, 1966, the day after the note was drawn. No payments were ever made to payee (Ferguson) on account of the note and all monies paid were to Mitzner.

Each succeeding transaction was between Baylies and Mitzner and in every case large bonuses in excess of the legal interest rate were charged, and despite disclaimers by Mitzner that these were usurious bonuses, he nevertheless seeks to collect them as debts, not to refund them as his testimony claimed would be done (App. 62).

CONCLUSION

Appellants hold that as a matter of law no title passed *through Ferguson to Mitzner* and that Mitzner is not a holder in due course. Not one scintilla of evidence was offered by appellee to show that he (Mitzner) does not still retain a security interest in 1317 Riggs Street, N.W. under the deed of trust, which property is still titled in Baylies, and the deed of trust held by Mitzner has never been re-

leased; nor has Mitzner shown that it is legally possible for a deficiency to exist while a security interest still remains.

Respectfully submitted,

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Attorney for Appellants

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,907

ERNEST S. MITZNER,

Appellee,

v.

WILLIAM C. BAYLIES, et al.,

Appellant.

PETITION FOR REHEARING

Comes now the Appellee, Ernest S. Mitzner, by his Attorney and petitions the Court to rehear the above entitled cause and for grounds for this Petition states as follows:

1. On page 7 of its opinion, this Court states:

> "There is literally nothing from which the jury could rationally infer that Appellee did not understand himself to be lending money directly to Appellants."

But this is exactly what the jury did do. The case was submitted to the jury with distinct instructions to determine whether the circumstances between the parties was a loan of money as distinguished from the sale of a note (App. 265). There was no evidence presented

which indicates that the jury did not act rationally or did not understand the instructions from the Trial Court. In fact not one single objection was made to the instructions by the Defendant in the Court below.

2. This Court does not anywhere in its opinion say that the Trial Judge erred insubmitting the case to the jury because the facts presented by the Plaintiff were usury as a matter of law. Instead, this Court says that the facts presented prevented the jury from reasonably inferring anything other than a loan. Yet the facts discussed by the Court on page 3 of its opinion clearly raises an issue of fact when this Court said.

> "At this time Appellants paid Appellee $2,900.00. Of this sum, $375.00 represented accrued interest for the original term of the note, $25.00 was a fee to Sheeskin, and $25,000.00 was variously characterized as consideration to demolish the structure (Appellee) or consideration for the six (6) month extension (Appellants)."

The fact that both the parties in the law suit characterized the payment of $2,500.00 for different purposes, alone, was sufficient to submit the case to the jury to determine the issue of credibility which is a province of the jury and not of the Trial Court nor of the Appellate Court. *Blitz v. Hobbs*, Mun. Ct. of App., 1960, 160 A.2d 803.

3. The Court in its opinion on page 6 refers to the case of *McDonald v. Stone*, 86 A.2d 624. That case is almost identical to the situation we have before us. In that case, McDonald, the purchaser of a house, executed a 2nd Trust Note to the order of Key who was the broker in the transaction. Key endorsed the Note to Sligo Hills Corporation, the builders of the house and that corporation endorsed it in blank. Stone purchased the Note from

Sligo Hills Corporation at a 20% discount. Key had contacted a broker named Zirwes, another real estate broker who interested Stone in the purchase of the Note. Stone wrote a letter to the title company transmitting a check for the discounted price of the Note in question. The Note and Trust were prepared by the title company on the same day that McDonald settled on the purchase of the house. The Municipal Court of Appeals for the District of Columbia ruled in the *McDonald* case that the question narrowed down to whether the Trial Judge erred in failing to rule as a matter of law that the transaction was a direct loan by Stone to McDonald rather than a purchase of a Note at a discount. The Court further said that it is not usurious to purchase a Note at a discount. The Court said that the fact that the Note was made and settlement completed on the same day was not in and of itself usury as a matter of law but was one of the facts to be considered in determining whether the transaction was usurious. The Court went on to say:

> "The case has doubtful and perhaps even suspicious aspects. But viewed in its entirety the evidence was such that either one of two different conclusions might reasonably be drawn from it. That being so it cannot be said that the ruling of the Trial Judge was plainly wrong or without evidence to support it."

The essential situation in the case before the Court is strikingly similar. Here, a real estate broker, Reiss, who can be compared with Key in the *McDonald* case, called Kamins who is similar to Zirwes in the *McDonald* case. Kamins, like Zirwes, interested another party in the purchase of the Note. Here the Plaintiff sent the funds for the purchase of the Note to his attorney rather than to a title company as in the *McDonald* case. The attorney like the title company had the Note drawn on the same day the settlement was consummated. In both cases the parties had not met and had not discussed the matter at arms length. In both cases the parties did not know

that the Note and Trust was not in existence until after they had agreed to purchase it. This case like the *McDonald* case may have "doubtful and perhaps even suspicious aspects". But the evidence was such that one of two different conclusions might reasonably be drawn from it. Under such circumstances, the Trial Court properly referred the matter to the jury. The fact that the jury's conclusion, based on the evidence, was different than the conclusion drawn by this Court when it read the record of the case, tends to prove that a factual issue existed upon which reasonable men might differ. The jury, however, had an advantage over this Court in that the jury saw the witnesses and heard the testimony first hand. The jury was in a much better position to evaluate the credibility of the witnesses and to make a determination on the factual issues. When reasonable men may honestly differ either as to the facts or as to the inferences to be drawn from the facts, the case presents jury questions and may not be decided by the Judge. An Appellate Court does not consider questions of mere weight or credibility of evidence. It decides only its sufficiency to make a case for jury consideration. *Yellow Cab Company of D.C., Inc. v. Griffith*, Mun. Ct. of App., 1944, 40 A.2d 340. By reaching the conclusion in the opinion, this Court has ignored previous decisions which state that all the facts and circumstances of a transaction must be considered before the conclusion of usury can be reached. This Court substituted its conclusions for that of the jury. This, an Appellate Court cannot do.

4. This Court in its opinion cites *Elliott v. Schlein*, 104 A.2d 418. There was, however, one essential difference in the *Elliott* case which distinguishes it from the case at bar as well as from the *McDonald* case. In the *Elliott* case the parties had met and had had a face to face confrontation and discussion prior to the time the transaction was agreed upon. From the evidence presented in the *Elliott* case, the Court could not make any other reasonable infer-

ence, but that the purported sale of the Note was merely a cloak for usury. It did not present the factual questions presented in the *McDonald* case as well as our case.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing was mailed, postage prepaid, to Landon G. Dowdey, Esquire, to his last known office address, 2812 Pennsylvania Avenue, N.W., Washington, D.C.; and Stuart H. Robeson, Esquire, to his last known office address, 1828 Jefferson Place, N.W., Washington, D.C., this 14th day of April, 1970.

_____
Jacob Sheeskin
Attorney for Appellee